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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. .....

ARTHUR ANTHONY ROCCO, alias ARTHUR LEWIS

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Arthur Anthony Rocco, petitioner, respectfully prays that a writ of certiorari issue to review the de-

cision and judgment of the United States Court of Appeals for the Third Circuit, entered February 4, 1952 affirming the judgment of the United States District Court for the Western District of Pennsylvania on the verdict of a jury finding petitioner guilty on eighteen counts of an indictment charging petitioner with violations of the Act of Congress of June 25, 1948, as amended, 18 U.S.C.A. §§ 2314 and 2315, formerly the National Stolen Property Act.

THE OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania filed an Opinion, which is reported in 99 Fed. Supp. 746, and in the Record at 77a et seq. The Opinion of the United States Court of Appeals for the Third Circuit was entered on February 4, 1952 and is not yet reported (R. 88a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A., § 1254 (1). The judgment sought to be reviewed was entered February 4, 1952.

SUMMARY STATEMENT

This case presents for correction errors of the United States District Court for the Western District of Pennsylvania, erroneously affirmed by the United States Court of Appeals for the Third Circuit. As above indicated, this case is of importance and presents questions which should be decided by this Court in the public interest. The indictment contained thirty counts and charged (1) the transporting or causing to be transported in interstate commerce of certain U. S. Treasury, HOLC, and West Penn Power Company bonds from points outside of Pennsylvania to Pennsylvania, (2) the receiving, selling or disposing of the said bonds, and (3) the transporting or causing to be transported in interstate commerce the said bonds from Pennsylvania to points without the State. At the close of the testimony, the Trial Judge withdrew from the consideration of the jury the counts of the indictment having to do with the transportation of the bonds from Pennsylvania to other States, as well as certain counts concerning bonds originally the property of one Harry Richter, who had died prior to the trial. The counts which the jury were instructed to disregard were the 1st, 2nd, 3rd, 6th, 9th, 12th, 15th, 18th, 21st, 24th, 27th and 30th.

A motion was then made for judgment of acquittal on all the remaining counts of the indictment, on the ground that the Government had not proved a case

worthy of consideration by a jury, of any violation of the laws of the United States, as set forth in the Information. This motion was refused, and the case submitted to the jury. The jury found the defendant guilty on all of the remaining counts.

The motion for judgment of acquittal was renewed, with the alternative of a motion for new trial, and on August 3, 1951, was refused by the Court.

On August 31, 1951, petitioner was sentenced to imprisonment for a period of ten years in a penitentiary and to pay a fine of $10,000 and the costs. Petitioner then appealed from the judgment of conviction. His bond was continued pending appeal.

On February 4, 1952, the United States Court of Appeals for the Third Circuit filed its Opinion per curiam affirming the judgment of conviction. The facts of the case are as follows:

On March 2, 1944, the Bank of America, Los Angeles, California, was the owner of and had in its possession a number of Home Owners Loan Corporation bonds of the face value of $100,225. The Government proved that on that date these bonds were on the desk of the secretary to the Assistant Vice President of the Bank, and that after she had taken care of two customers at the counter she returned to her desk and the bonds were gone; that they made an extensive search for the bonds but were unable to find them.

Morris Kessler and Samuel Hirsh, owners of certain U. S. Treasury bonds in the total amount of $100,000, on May 15, 1945, took them to the Union National

Bank, Newark, New Jersey, for the purpose of sale, as these men wished to buy a new issue of bonds. The Executive Vice President of this Bank sold $24,000 of these bonds to a brokerage house in Newark, and $76,000 worth to the Chemical Bank in New York. He then dictated a letter of transmittal, in which his secretary enclosed the bonds and listed them. At that time the bonds had been on his desk in two separate packages. The secretary went to lunch and the Vice President went to answer the telephone. When he returned he found that the bonds were gone. They made a search for them but could not find them. They were bearer bonds.

On July 21, 1948, the New York office of Blyth & Company came into possession of $20,000 worth of West Penn Power Company 3½% 1966 bonds. Exhibit 8 was offered and identified as the letter of transmittal of the shipment from Blyth & Company, Los Angeles, California, to the New York office, of the securities attached. These bonds were intended to be delivered to L. F. Rothchild on that day. They were turned over to the assistant head runner, who was to give them to runners to deliver. These securities had been placed on the desk of the assistant head runner and he put them in a wire basket temporarily. There were other bundles of securities in the same basket and all of these he handed to the runner, or messenger, McDonnell, for delivery. Mr. McDonnell delivered the various bundles of securities to the several customers but he did not deliver any bundle to Mr. Rothchild, and when the receipts were checked, it was found that there

was no receipt from Rothchild. Rothchild's bond clerk testified that they did not get a delivery of the bonds. The various customers to whom securities had been delivered that day were called upon, the property searched, etc., but no trace was found of the missing bonds.

On September 13, 1948, Henry Puchall, a general building contractor of New York City, was the owner of U. S. Treasury bonds, and on that day he delivered $20,000 worth of such bonds to Mr. Schiffman of the Modern Industrial Bank, New York City, in order to make a loan of $30,000. Mr. Schiffman was manager of the Bank. Mr. Schiffman turned over to his secretary these bonds, for the purpose of putting them in the strong box. In the afternoon, Jacob Puchall, brother of Henry, came in with his $10,000 worth of similar bonds, in order that the loan of $30,000 could be negotiated. When Mr. Schiffman's secretary looked in the drawer where she usually kept her securities, the bonds were not there. They made a search but could not find any trace of them.

On March 16, 1948, according to the testimony of Harold E. Nesbitt, Cashier of the Homer City Bank, Homer City, Pennsylvania, Arthur Rocco, this defendant, brought into his Bank $20,000 worth of U. S. Treasury bonds and asked that they be sold. These bonds were sold by the Bank to the Mellon National Bank, Pittsburgh, Pennsylvania, and the witness gave Rocco $20,316.75, full proceeds of the sale of the bonds, plus $1226.53 for the coupons.

Summary Statement

On March 24, 1948, this witness testified that Rocco brought into his Bank $20,000 worth of U. S. Treasury coupon bonds and asked that they be sold. These bonds were delivered to the Pittsburgh brokerage firm of Merrill, Lynch, Pierce, Fenner & Beane, and the following day the bank was credited at the Mellon National Bank for the proceeds of the bonds.

On March 25, 1948, the full proceeds amounting to $20,351.36 for the bonds and $1248.82 for the coupons were paid over to Rocco by the witness.

On August 5, 1948, Rocco brought into this Bank $20,000 worth of U. S. Treasury bonds asking that they be sold. These also were sold to the Mellon National Bank and the full proceeds amounting to $20,-265.43 and $1357.66 for the coupons paid in cash to Rocco on April 6, 1948.

On April 12, 1948, Rocco brought in $19,000 worth of U. S. Treasury bonds for sale. These were sold to the broker, Merrill, Lynch, Pierce, Fenner & Beane. On April 13, 1948, the bank's account at Mellon National Bank was credited with $19,239.77, being the full proceeds of the bonds, and $1387.50, the amount of the coupons, which amounts were paid to Rocco in cash on April 13, 1948 (R. 12a).

Gilbert S. Parnell, attorney at law, Indiana, Pennsylvania, testified that on September 10, 1948, Arthur Rocco came to him and said that he was not acquainted with banks in Indiana, and asked him if he would sell the following bonds for him; that is, $5,000 worth of U. S. Government bonds, and $20,000 worth of West Penn Power Company bonds. The witness took these

bonds to the First National Bank of Indiana, Pennsylvania, which sold the bonds, and subsequently the witness received the full proceeds and gave them to Rocco (R. 19a).

On September 28, 1948, Rocco brought Home Owners Loan Corporation bonds to the witness' office and asked him to sell them, mentioning that he had some business ventures (R. 19a), and on October 25, 1948, he brought in additional HOLC bonds telling him that he had won some money and some bonds gambling (R. 20a-23a). These bonds in the amount of $47,600 were sold through the First National Bank of Indiana, Pennsylvania, and the full proceeds delivered to the defendant (R. 20a).

On October 20, 1948, U. S. Treasury bonds in the amount of $20,000 were sold by the defendant through the First National Bank of Indiana, Pennsylvania, in the same manner (R. 20a).

Harold Nesbitt was recalled to the witness stand by the Government and asked whether or not there had been any conversation between him and the defendant, Rocco, at the time the bonds were brought into the Homer City State Bank (R. 31a-32a). This testimony was objected to and the objection overruled by the Court (R. 34a-35a). He testified that on August 3, 1948, at about 6:30 or 6:45 in the evening, defendant contacted him at his home, taking from his pocket one HOLC bond in the face amount of $1000, and asked the witness if they were negotiable or marketable. The witness told him he felt sure that that particular issue of bonds had been called, as the 3% rate of interest

was higher than the Government policy. When asked how many he had, the witness said that Rocco told him that a friend of his in New York had considerable amount of them. Whereupon the witness said he would inquire if they were salable. Rocco then withdrew from his pocket a slip of paper which contained writing and then asked if there was a market for $20,000 worth of West Penn Power bonds, 3½% bonds due in 1966. He said a friend of his in New York had $20,000 worth. The witness promised to find out and advise him. On several occasions he contacted the witness by phone and asked whether he had found out about the different issues. A few days later Rocco called the witness on the phone at the Country Club and told him he was calling from Washington, D. C., and asked what information he had obtained as to selling the bonds. About a week later they had another conversation by phone (R. 37a-38a).

A motion was made by defendant's counsel to strike the above conversation from the record, which motion was overruled by the Court (R. 38a-40a).

It is the contention of the Government that all of the bonds sold by defendant were part of the bonds missing as aforesaid in California, New York and New Jersey.

The Government rested and the defendant did not introduce any evidence, but made a motion for judgment of acquittal, as above indicated.

It is the contention of the petitioner that the foregoing facts were wholly insufficient to support a conviction.

QUESTIONS PRESENTED

I.

Petitioner was convicted of transporting or causing to be transported in interstate commerce negotiable securities or bonds alleged to have been stolen, and also of receiving, selling or disposing of said bonds. Did the Government meet the burden of proof, beyond a reasonable doubt, (1) that the bonds were stolen; (2) that they were transported or caused to be transported in interstate commerce by petitioner; (3) that they retained their stolen character as well as their interstate character when received, sold or disposed of by the defendant; and (4) that he received, sold or disposed of said bonds knowing them to have been stolen? Petitioner contends that there is no legal proof to connect him with the bonds excepting that which shows that he caused them to be sold, and that all of the other allegations amount to no more than inference based upon inference, and that therefore he was entitled to a judgment of acquittal.

II.

Does the "recently stolen property rule" apply in this case? Petitioner contends that on account of the negotiable character of all of the securities or

bonds involved in this case, and the failure of the Government to prove, among other things, when they were alleged to have been transported in interstate commerce, the rule that possession of recently stolen property is sufficient to raise a presumption that the possessor is the thief, cannot be applied, and that it was error in the Court below to so apply it. The Court went even further and applied the rule to the transportation or causing to be transported of the bonds in interstate commerce. May this rule be invoked where there is no evidence of petitioner's connection with the bonds, excepting his possession thereof? These questions are of first impression and have not been decided by the Appellate Courts.

III.

The only evidence which even remotely showed knowledge in the petitioner of any of the bonds prior to the day he caused them to be sold, was the testimony of a witness as to an alleged conversation with petitioner relating to certain of these securities. Did the Trial Judge err in admitting in evidence such testimony for the reason that it was an attempt to prove the corpus delicti by the confession or admission of the defendant alone?

SPECIFICATION OF ERRORS

The Court of Appeals for the Third Circuit erred:

1. In affirming the judgment of the United States District Court for the Western District of Pennsylvania to the effect that the defendant, petitioner herein, was not entitled to a judgment of acquittal because the Government did not meet the burden of proof in this case.

2. In affirming the judgment of the said United States District Court holding that the defendant, petitioner herein, was not entitled to a new trial for the reasons set out in his motion, particularly that the verdict was against the weight of the evidence and because of the admission in evidence of testimony attempting to prove the corpus delicti by the confession or admission of defendant alone.

STATUTES INVOLVED

The pertinent provisions of the Penal Code are set forth in the Appendix at the end of this Petition and Argument.

REASONS FOR GRANTING THE WRIT

(a) The United States Court of Appeals for the Third Circuit in approving the application of the "recently stolen property rule" to negotiable instruments or bonds in this case, has rendered a decision in conflict with the decision of this Court in *Shaw v. Merchants National Bank of St. Louis,* 101 U.S. 557, 25 L.Ed. 892, which makes a distinction between personal property in general and negotiable instruments; as well as *United States v. Bollenbach,* 326 U.S. 607, 66 S.Ct. 402, which also recognized the distinction between ordinary personal property and negotiable instruments such as were the bonds in the present case.

(b) The said Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by your Court, namely, the applicability of 18 U.S.C.A., §§ 2314 and 2315 to a case where all that was proven by the United States was the disappearance of certain bonds in one State and their appearance in the hands of petitioner in another State after varying intervals of time.

(c) The said Court of Appeals in affirming the judgment of the District Court has decided that proof of the mere possession of the said property by the petitioner was sufficient upon which to base an inference that he transported or caused to be transported in in-

terstate commerce the said property, which is directly contrary to the decision of this Court in United States v. Bollenbach, *supra.*

(d) There are no decisions of this Court, insofar as petitioner is aware, under the present Act of Congress, nor under the prior National Stolen Property Act as to the effect of cessation of interstate commerce, when the bonds which disappeared in one State came to rest in another State, and the prosecution is against an individual defendant and is not one for conspiracy.

(e) The courts mentioned have permitted this petitioner to be adjudged guilty of crimes upon evidence which amounted to no more than an inference and which wholly failed to sustain the burden of proof placed upon the Government in a criminal case.

(f) The Trial Judge, contrary to law, permitted proof of the corpus delicti by the confession or admission of the defendant without any other evidence thereof.

(g) The manner of submission of this case to the jury by the Trial Judge raises an important question in the administration of Federal criminal justice.

(h) The questions presented are important not only to this petitioner but also are of public interest, if the rights of citizens to a fair trial in criminal cases are to be respected.

ARGUMENT

I. THIS DECISION CONTRARY TO APPLICABLE SUPREME COURT DECISIONS

There is no question but that the bonds involved in this case are negotiable instruments. They were made payable to bearer and passed by delivery. It is the contention of the petitioner that in the period between the disappearance of these bonds in California, New Jersey and New York, respectively, they could have passed into the hands of an innocent purchaser for value which, even had they been stolen, would have removed the taint from them and permitted them to be passed on to a second, third or fourth person. At common law and under the Negotiable Instruments Act, an innocent holder may take good title even from a thief: 10 C.J.S. 1117, § 507. The Court will take judicial notice of the fact that the Uniform Negotiable Instruments Act has been adopted in New York, California and New Jersey, as well as in Pennsylvania. Therein lies the distinction between other personal property and negotiable instruments. The well-known general law is that ordinary personal property which is stolen retains its stolen character no matter through how many hands it passes, and it may be recovered by

the owner at any time. But, as said in C.J.S. just referred to, the innocent purchaser who acquires a negotiable instrument from a thief "may retain it even as against the true owner". This was said also in *Shaw v. Merchants National Bank of St. Louis,* 101 U. S., 25 L.Ed. 892, where the Supreme Court of the United States, speaking through Mr. Justice Strong, said:

> "So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and, therefore, negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. * * * Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange as, in some sort, sacred instruments in favor of bona fide holders for a valuable consideration without notice. Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the

person who offers to sell it, that is, nothing short of mala fides will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Ad. & E., 870, Goodman v. Simonds, 20 How. 343, 15 L. Ed., 934; Murray C. Lardner, 2 Wall., 110 17 L. Ed., 857; Matthews v. Poythress, 4 Ga. 287."

The foregoing decision of this Court was in 1879, many years prior to the adoption of the Uniform Negotiable Instruments Act, but since that Act, there is no question that bonds "payable to bearer" would be added to the list of instruments held to pass a good title by delivery, in the foregoing case. As the Justice says, "The purchaser is not bound to look beyond the instrument".

Ballenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, was a case where the defendant was convicted of conspiring to transport securities in interstate commerce. The Court in its Opinion delivered by Mr. Justice Frankfurter, said at page 404:

> "Bollenbach could not properly be convicted for the offense for which he was charged and for which he was convicted, namely, for having conspired to transport securities across State lines merely on proof that he was a 'fence,' i.e., helped to dispose of the stolen securities after the interstate transportation was concluded."

This case was reversed by the Supreme Court because of the manner in which it was submitted to the jury by the Trial Judge. The Court makes the following statement, as showing its disapproval of the conviction of a defendant merely because he had in his possession stolen notes. At page 405 it is said:

> "The Circuit Court of Appeals read the judge's charge to mean that the jury was permitted to find Bollenbach 'guilty of a conspiracy to transport stolen notes, if he joined in their disposal after the transportation had ended.' We so read it. That Court, as we have seen, properly rejected the propriety of leaving the case to the jury as the trial judge had left it, but sustained the conviction on its own accessory-after-the-fact theory."

The Supreme Court rejected the accessory-after-the-fact theory and reversed the conviction.

In our case, the only proof that the Government was able to connect this petitioner with these bonds was that he caused them to be sold. Obviously, he could not have been convicted of transporting or causing to be transported securities across the State lines merely on such proof. The Government wholly failed to prove the time when such securities actually crossed State lines, and in the indictments it alleged the date as being that on which the defendant offered them for sale. The indictment, however, is a mere accusation and not proof, so that so far as proof is concerned, these securities might have been within the State of Pennsyl-

vania days, weeks or even months, before they came into the hands of this petitioner. If so, their interstate character had completely disappeared and the defendant could not be convicted under the Act of Congress, but would be amenable to prosecution only under the applicable State statute. It was the burden of the Government to prove the interstate character of these securities and that they retained such character. Therefore, the decision of the District Court, affirmed by the Court of Appeals, was at variance with that in the Bollenbach Case as to receipt and disposition of the bonds, and at variance with the Shaw decision as to the character of the negotiable instruments and the application of the "recently stolen property rule" to such instruments.

II. NO CRIME PROVEN UNDER EITHER SECTION OF THE CODE

The Government was required to prove, in the first place, that the bonds were in fact stolen (i.e. that they were lost by the owner and also lost by a felonious taking: *Vaughn v. United States,* 272 Fed. 451 (C.C. A. 9)); all it proved was that they mysteriously disappeared. Secondly, it was required to prove, and beyond a reasonable doubt, that the bonds were transported in interstate commerce; there is no proof that they were actually transported in interstate commerce, although the fact that they disappeared in one State and reappeared in another State would raise a strong presumption that they were transported by some one at some time or other. The time, however, is a matter of proof, not guess. The government was also bound to prove beyond a reasonable doubt that the bonds retained both their stolen character and their interstate character at the time they were received by the petitioner, if they were in fact stolen; all the Government proved was that the bonds appeared in the possession of the petitioner, and relied upon the "recently stolen property rule" to show that the defendant knew they were stolen and had caused them to be transported in interstate commerce. Throughout the whole case we have nothing but an inference upon an inference. A conviction based upon such slight evidence must be set

aside; otherwise it is a violation of the right of a citizen to a fair and impartial trial.

The petitioner submits that because of the fact that negotiable instruments may be acquired by an innocent holder for value and thus lose their stolen character, and possession held even as against the true owner, the "recently stolen property rule" cannot be applied to such instruments. To hold otherwise would place the burden upon the defendant of disproving the fact of interstate commerce, and of proving that the negotiable instruments have lost their stolen character and also their interstate character. However, the burden of proving these things is upon the Government and it is not the duty of the defendant to disprove them. The Court below and the Appellate Court improperly applied the law in this regard. This is evident when we find that the Trial Judge in instructing the jury called their attention to the *"unexplained* possession" of these instruments by the defendant. If the defendant had been required to go upon the witness stand and explain his possession, then he would be required to do something which is prohibited by the Constitution of the United States. The whole decision rests upon a misconception of the law by the Trial Judge and the Appellate Court, and the failure to distinguish between negotiable instruments and other forms of personal property. This is further evidenced by his application of the "recently stolen property rule" to the mere possession of the bonds by petitioner. Such application of the law is at variance and in direct contradiction of the Bollenbach Case, *supra.*

A reference to the Opinion of District Judge Marsh, which is affirmed by a Per Curiam Opinion of the Court of Appeals, discloses that the Home Owners Loan Corporation bonds disappeared from the Bank of America in Los Angeles, California, on May 2, 1944, and in September and October, 1948, more than four years thereafter, some of these bonds were sold by the defendant through the First National Bank of Indiana, Pennsylvania. Where were these bonds between May of 1944, when they disappeared in California, and September and October, 1948, when they were sold in Pennsylvania? If they were in fact stolen in 1944, although the evidence shows only that they disappeared, they might have been sold many times over in the period of more than four years. If they were, they were no longer stolen property when they were sold by the defendant in Pennsylvania in 1948. On the other hand, if these bonds left California in May of 1944 and arrived in Pennsylvania within a week thereafter, and were in Pennsylvania for a period of four years, they had most certainly lost their interstate character and therefore the receipt and sale of them by the defendant was not a federal offense. It was the burden of the Government to show the character of these bonds at the time that the defendant sold them.

This Opinion also shows that United States Treasury bonds disappeared from the Union National Bank in Newark, New Jersey, May 15, 1945, and some of them were sold in March, April and September of 1948, a period of approximately three years thereafter.

The same argument applies to these Treasury bonds as to the HOLC bonds.

As to the West Penn Power Company bonds which disappeared from Blyth & Company in New York July 21, 1948, these were sold on September 10, 1948, or a period of approximately two months thereafter. While the time element is not so great as to these bonds, the same argument applies.

On September 17, 1948, United States Treasury bonds disappeared from the Modern Industrial Bank in New York and were sold on October 20, 1948, a period of a little over a month. Here, as in the West Penn bonds, the time element is not so great, but the same argument applies.

The District Judge states in his Opinion (99 F.S. 748) that:

> "Defendant did not deny that the majority of the bonds turned up in his possession and did not deny that he sold them. Although defendant is not required to take the stand in his own defense and his failure so to do raises no presumption against him, the failure to testify does not raise a presumption in his favor."

The defendant was not required to deny anything relative to these bonds. It was the burden of the Government to prove the facts beyond a reasonable doubt

and this, we submit, it failed to do. Again, the District Judge says at page 748:

> "The sale of the bonds from each purloined group by this defendant was evidence to show that he was part of a fraudulent plan, scheme, or design to dispose of stolen securities, and a strong inference of guilty knowledge arose from this possession alone."

There was no evidence that this defendant was part of any fraudulent plan, scheme or design. This was not a prosecution for conspiracy nor does any particular person appear anywhere in the evidence either as connected with the disappearance of the bonds, the transportation thereof, or the receipt thereof, and the only actual connection of the defendant is in the sale. Therefore, any cases which hold that the interstate character of a shipment begins when it is first put into interstate transportation and continues until the sale or disposition of the property, do not apply. A conspiracy to transport, sell and dispose of securities naturally involves one entire and indivisible transaction. This defendant, an individual, is personally and alone charged with the crime. There is absolutely no connection between him and any other named individual in any other State. The vague reference to a friend in New York State, even if accepted at its face value, which is very little, amounts to no more than the barest scintilla and certainly not that measure of proof which is placed upon the Government in a case of this kind. It may be, as the Judge said, that the

evidence looked suspicious, but suspicion alone is not sufficient for conviction. Again, the Judge says at page 748, that from the circumstances, "the jury could infer that he transported, or was instrumental in transporting these securities from the place of theft into Pennsylvania for sale at or about the time they were sold." We respectfully submit that in so finding, the Trial Judge completely overlooked the fact that it was the burden of the Government to show the interstate character of the securities and that it had not terminated at the time they were sold, and that there is no evidence whatever upon which to base an inference that, as the Judge says, "he (defendant) transported or was instrumental in transporting these securities from the place of theft into Pennsylvania for sale *at or about the time they* were sold."

The provision in the law relative to the interstate character of the shipment is exactly like that contained in the original Stolen Motor Vehicle Act, and as there are no cases under 18 U.S.C.A., § 2315, we will refer to these cases under the Motor Vehicle Act.

In *Hill v. Sanford,* 131 F.2d 417, C.C.A. 5, Certiorari denied 318 U.S. 774, 63 S.Ct. 771, the Court says at page 418:

> "It is true that under 18 U.S.C.A. § 408 the stolen motor vehicle concealed, sold or disposed of must be moving as, or be a part of, or constituting interstate commerce at the time it is concealed, or disposed of. If it has come to rest so as no

longer to be a part of or to constitute interstate commerce, State law regarding stolen property rather than federal law would be applicable. Davidson v. United States, 8 Cir., 61 F.2d 250; Cox v. United States, 8 Cir., 96 F.2d 41."

Cox v. United States, 96 F.2d 41, C.C.A. 8, is also a case under the Motor Vehicle Theft Act. In this case, Circuit Judge Sanborn reversed a judgment of conviction and granted a new trial. At page 43 the learned Judge says:

> "One of the essential elements of the crime, which the government was required to prove beyond a reasonable doubt, was that the automobile sold to Powell in Missouri had moved in interstate commerce and was still a part of interstate commerce. Davidson v. United States, 8 Cir., 61 F. 2d 250, 255; McAdams v. United States, 8 Cir., 74 F. 2d 37, 39. Unless the stolen automobile had moved and was still moving in interstate commerce when it was sold, the sale was not a federal offense, and the court below was without jurisdiction to deal with it."

III. CORPUS DELICTI PROVEN ONLY BY ADMISSION OF DEFENDANT

This petitioner was further denied a fair trial in that the Cashier of the Homer City Bank was permitted to testify to an alleged conversation with petitioner with reference to certain bonds, and in which the defendant is alleged to have stated that his friend had some of them in his possession in New York. The Court below disposes of this contention by saying: "This evidence was certainly relevant to the issues involved and the objection is without merit". Nowhere does the Judge answer the contention of the defendant that such evidence was absolutely inadmissible because it was an attempt to prove the corpus delicti by the admission or confession of the defendant alone, which is contrary to the law, especially as set out in *Pines v. United States,* 123 F. 2d 825, C.C.A. 8, the law is stated thus at page 829:

> "The gist of the offense, however is the transportation of these described spurious instruments in interstate commerce. Having them in possession or even attempting to pass them as genuine was not a Federal offense under this statute. It was therefore of vital importance to prove that the instruments were transported or caused to be transported by someone in interstate commerce.

This, being the corpus delicti, could not be presumed, nor could it be confession or admission of the defendant. Tingle v. United States, 8 Cir., 38 F.2d 573; Ryan v. United States, 8 Cir., 99 F.2d 864; Gulotta v. United States, 8 Cir., 113 F.2d 683. The evidence shows that defendant admitted to peace officers that he had possession of the securities in Minneapolis in November, 1939, and that he borrowed an automobile from a Minneapolis party. It appeared from the evidence that he had the automobile and the securities in his possession in Council Bluffs, Iowa, in November, 1939. Had there been evidence independent of defendant's admission that he had possession of these securities in Minneapolis, this would have been sufficient corroborative evidence that he transported or caused to be transported the instruments from Minneapolis to Council Bluffs. Bruce v. United States, 8 Cir., 73 F.2d 972; Bennett v. United States, 70 App. D.C. 76, 104 F.2d 209. There was here, however, no evidence save his own admission that he had possession of these securities in Minneapolis, Minnesota, and there is therefore lacking a vital link in the chain of circumstances by which it is sought to establish the transportation in interstate commerce. The corpus delicti includes not only the body or substance of the crime, but also the criminal means by which it was committed. The corroboration is not sufficient if it tends only to support the admission. It must embrace substantial evidence of the corpus delicti,

though it need not in itself be sufficient proof of guilt. Forte v. United States, 68 App. D.C. 111, 94 F.2d 236, 244, 127 A.L.R. 1120, Gulotta v. United States, supra.

* * * * * * *

In Tingle v. United States, supra, we reversed because we could find no evidence of an independent nature corroborating the statements and admissions of the defendant. In Forte v. United States, supra, a conviction on a charge of transporting a stolen auto vehicle in interstate commerce was reversed because of the inconclusive independent evidence that defendant knowingly transported the automobile as a stolen vehicle. In that case, defendant admitted to the officers that he knew the car was stolen. He was driving it at the time. He offered a police officer $297 if he would let him go. The original District of Columbia tags, where the car was licensed, were not on it; New Jersey tags were on it, and other District of Columbia tags were in it, as well as Maryland tags. These were admittedly suspicious circumstances but the court held that they were not sufficient to 'point to knowledge on the part of the appellant that (the car) was stolen.' In Gulotta v. United States, supra, defendant had been convicted for falsely representing himself to be a citizen of the United States for a fraudulent purpose. In reversing the case, this court, speaking through Judge Thomas, said (113 F. 2d 686):

'But the rule requires some such independent evidence, and it is conceded by the government that the record is barren of all such extrinsic evidence in this case, * * *.'

In the instant case we have carefully searched the record and find no evidence to show that defendant transported these securities from Minnesota to Iowa, except his own admission. His possession of them in Iowa would of course, not prove that he transported them from any place in particular. There was no independent proof of the presence of these securities in Minnesota. Because of the lack of sufficient evidence of transportation, the court should have granted defendant's motion for a directed verdict."

Wherefore, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Title 18, § 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representa-

tion of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806, amended May 24, 1949, c. 139, § 45, 63 Stat. 96.

Title 18, § 2315. Sale or receipt of stolen goods, securities, or monies.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be

used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 628

ARTHUR ANTHONY ROCCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 88)[1] is reported at 193 F. 2d 1008. The opinion of the District Court (R. 77-86) on petitioner's motion for judgment of acquittal or a new trial is reported at 99 F. Supp. 746.

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[1] "R." refers to the printed appendix filed by petitioner; "Tr." to the typewritten transcript of the trial; and "D." to the list of documents comprising the record on appeal.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1952 (R. 89). The petition for a writ of certiorari was filed on March 4, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction.

2. Whether the trial court erred in admitting in evidence petitioner's conversation with a banker regarding the disposition of certain securities alleged to have been stolen.

STATUTES INVOLVED

18 U.S.C. 2314 provides in pertinent part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *.
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

18 U.S.C. 2315 provides in pertinent part as follows:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or mer-

chandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

18 U.S.C. 2(b) provides:

Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania on eighteen counts, nine of which charged him with transporting or causing to be transported to the Western District of Pennsylvania certain identified securities which had been stolen outside the State of Pennsylvania, in violation of 18 U.S.C. 2314, and the other nine with the sale of such securities in violation of 18 U.S.C. 2315 (D. 2; R. 76). He received a general sentence of 10 years' imprisonment and a fine of $10,000 plus costs on the eighteen counts (R. 3). On appeal, the judgment of conviction was affirmed upon the opinion

rendered by the trial court in denying petitioner's motion for a judgment of acquittal or in the alternative for a new trial (R. 88).

The evidence adduced by the Government showed the following facts:

On May 2, 1944, a group of identified Home Owners' Loan bearer bonds, which had been called for redemption, having an aggregate value of $100,-225, disappeared from the desk of an employee of the Bank of America, at Los Angeles, California, while the employee was called away from her desk to answer an inquiry (Tr. 24-27, 32-34, 42-46).

On May 15, 1945, a group of identified bearer U. S. Treasury bonds of the face value of $100,000 disappeared from the desk of an official of the Union National Bank, at Newark, New Jersey, when the official momentarily left his desk (Tr. 67-75).

On July 21, 1948, a group of identified West Penn Power Company bearer bonds, with a par value of $20,000 vanished from the New York office of Blyth & Company, Inc., investment bankers, while they were being prepared for delivery to a purchaser (Tr. 102-103, 105, 107-109, 113, 116-120, 121-122, 128-142, 147, 149-156, 158, 159-165, 170-171, 173-176, 211-218).

On September 13, 1948, a group of identified U. S. Treasury bonds, of the par value of $20,000 pledged as collateral with the Modern Industrial Bank in New York City, disappeared from the desk

of an employee of the bank (Tr. 184-191, 199-202, 220-226, 235-242).

During March and April, 1948, petitioner sold a group of Treasury bonds, of a par value of $79,000, which were part of the bonds missing since 1945 from the Union National Bank in Newark. He acted through Nesbitt, an official of the bank at Homer City, Pennsylvania, petitioner's home town, through whom he had a few months earlier obtained a $700 loan (Tr. 260-261, 265-269, 277-334; R. 4-6, 9-13).

On the evening of August 3, 1948, petitioner conferred with Nesbitt concerning the disposition of additional bonds (Tr. 272, 386-388, 394-397, 405; R. 13-14, 35-37, 42-46). Petitioner inquired specifically about the marketability of HOLC and West Penn bonds, stating that a friend of his in New York had a "considerable amount" of the former and about $20,000 worth of the latter (Tr. 387-388, 396, 398-400, 403-405; R. 36-37, 44-45, 46-48, 49-52). Nesbitt told him that he would check their market status and advise him thereon (Tr. 387; R. 36-37). Subsequently, Nesbitt, whom petitioner had telephoned several times concerning the bonds, informed him that the HOLC bonds had been "called," but that if petitioner would furnish him with the serial numbers of the bonds he would attempt to negotiate them for him (Tr. 388-389; R. 37-38). Thereafter, petitioner failed to communicate with Nesbitt (Tr. 389; R. 38).

On September 10, 1948, petitioner sold, through one Parnell, an attorney and bank director in Indiana, Pennsylvania, all of the West Penn Power bonds, of $20,000 par value, which a few months before had disappeared from Blyth and Company in New York City (Tr. 341, 345-346, 353-355, 356-364, 369-370; R. 14, 18-19, 25-28, 28-31).

In requesting Parnell to make the sale for him, petitioner stated that the reason for doing so was that "he was not acquainted with banks in Indiana", although Indiana is but six miles from Homer City, where petitioner lived (Tr. 345, 352-353, 381; R. 18, 24-26). He also told Parnell that he won some bonds through gambling (Tr. 350; R. 22-23). Parnell had never before handled any security transactions for petitioner (Tr. 348, 351; R. 20-21, 23-24).

On September 28 and October 25, 1948, petitioner sold, through Parnell, another group of securities, of $57,600 par value, which were part of the HOLC bonds which had disappeared from the California bank in 1944 (Tr. 346-348, 350-352, 365-366, 368-371; R. 19-21, 22-25).[2]

On October 20, 1948, petitioner also had Parnell sell for him a group of securities of $20,000 par

[2] On May 1, 1944, the day preceding their disappearance, the HOLC bonds had been "called," and consequently since that day bore no interest on the investment which they represented (Tr. 26-27, 31). At the time of their sale petitioner told Parnell that he wished to negotiate them because "he had some business ventures" (Tr. 346; R. 19); and that he had won them and the Treasury bonds which he sold on October 20, 1948, by gambling (Tr. 350-351; R. 22-24).

value (Tr. 347). They were the Treasury bonds which had vanished, on September 13, 1948, from the Modern Industrial Bank in New York (Tr. 367-368, 378-379).

All the coupons which had become due since the disappearance of the bonds were still attached to the bonds at the time of their sale by petitioner (Tr. 265-267, 370-371).

Petitioner did not offer any evidence in his own behalf.

In submitting the case to the jury the judge charged that the jury must determine whether the bonds had been stolen; whether petitioner possessed the stolen bonds; whether he knew them to be stolen; whether he transported or caused them to be transported into Pennsylvania from another state, knowing them to have been stolen; and then whether he sold them knowing them to have been stolen in a state other than Pennsylvania (R. 66-67). He charged as to each transaction that there was no direct proof that defendant transported or caused the transportation of the bonds (R. 62, 63, 65, 66).

As to the U. S. Treasury bonds stolen in 1948, a month before their sale the judge charged (R. 67):

> * * * If you find that these bonds were stolen or converted, you might infer from the defendant's possession of these bonds, stolen a little over a month before, that he

> transported them or sold or disposed of them, knowing them to have been stolen, unless the defense has satisfactorily explained to you his possession of these bonds.

He stated that the inference might also arise with respect to the West Penn bonds stolen in July, 1948, to which petitioner referred on August 3, 1948, and which he sold in September, 1948, but stated that the inference was, in his opinion, a "weak" one (R. 68). He charged that "no inference" would arise from petitioner's possession of the bonds stolen in 1944 and 1945 (*ibid.*).

The judge further charged (R. 69):

> Consider all the evidence and the circumstances concerning his possession of these bonds. The fact that the defendant had possession of all of the bonds, if stolen, in my opinion is a circumstance from which you might find guilty knowledge on the part of the defendant. However, you are not bound by my opinion. It is your duty to find the facts.

ARGUMENT

1. Petitioner does not deny that he possessed and sold the stolen bonds. He argues, however, that proof of such facts is insufficient to prove (1) that he caused the transportation of the bonds knowing them to be stolen or (2) that the bonds which he sold were in interstate commerce at the time of sale. There is no merit in this contention.

a. As to the group of offenses charging trans-

portation of the stolen bonds, the Government had to prove (1) that the bonds had been stolen or converted, (2) that petitioner knew that fact, and (3) that petitioner caused the transportation. We submit that all such facts were proved.

Clearly the jury was entitled to believe that the bonds had been stolen. As the trial court pointed out, "The jury would have been naive indeed if it had found from the evidence that all four of these disappearances * * * were due to fortuitous circumstances instead of from theft, conversion, or fraud as charged. This is especially true when, without explanation, over $180,000.00 of the bonds eventually gravitated from four widely separated institutions into the possession of this defendant at his home in Homer City, Pennsylvania" (R. 79).

The jury also had before it ample evidence to justify the finding that defendant knew that the bonds had been stolen. The fact that four different sets of stolen bonds gravitated to petitioner in itself gives rise to such an inference. His furtiveness in going to Parnell in another town in order to negotiate most of the bonds, after he had disposed of one group in his home town, is another indication of guilty knowledge. The HOLC bonds, stolen in California, bore no interest because they had been called before the theft. The fact that four years later petitioner was negotiating them is another

circumstance tending to show his knowledge of their unlawful status.

Likewise the jury was justified in finding that defendant caused the transportation. The bonds had all been stolen outside the state of Pennsylvania. They all appeared in defendant's hands in the state of Pennsylvania. Obviously they had been transported in interstate commerce. Again, the jury was justified in finding, from the circumstance that all four groups of stolen bonds had gravitated to petitioner, that he was instrumental in bringing about that result, and that the bonds were transported to Pennsylvania because petitioner was in Pennsylvania and arranged to have them brought to him. This view is supported (but not, as petitioner claims, established) by the fact that, as to certain of the bonds, petitioner told Nesbitt that a friend in New York had them.

Thus the Government did not rely to any great extent on the presumption from recent possession to show guilty knowledge. In fact, the judge charged that no inference could be drawn from possession of the bonds taken in 1944 and 1945 and that the presumption arising from possession more than a month after the taking in 1948 was weak (R. 68). It is not the presumption, but, as the trial judge charged, the conglomeration of the proven facts that establishes petitioner's guilt.

The basic assumption of the petition for certiorari that the case rests on the presumption from

recent possession is thus unfounded. The trial judge's charge limited the effect of the presumption to the bonds stolen about a month before the sale and stated that the inference to be drawn therefrom was weak. His charge in this respect was clearly correct. See *Wilson* v. *United States,* 162 U.S. 613, 619-620; *Grover* v. *United States,* 183 F. 2d 650 (C.A. 9); *Petrilli* v. *United States,* 129 F. 2d 101 (C.A. 8), certiorari denied, 317 U.S. 657; *Husten* v. *United States,* 95 F. 2d 168 (C.A. 8); *Rosen* v. *United States,* 271 Fed. 651, 655 (C.A. 2).[3] The fact that the bonds were negotiable instruments does not detract from the weight of the fact that identified stolen bonds appeared in petitioner's possession in another state a short time after the theft.

b. As to the counts charging sale, the Government had to prove (1) that the bonds were stolen,

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[3] The case of *Bollenbach* v. *United States,* 326 U.S. 607, upon which petitioner relies, does not preclude the drawing of inferences, from the unexplained possession in one state of negotiable instruments stolen in another state, that the possessor had knowledge of the theft and participated in the interstate transportation of such instruments. It merely held that it was improper to infer the fact of a defendant's participation in the interstate transportation of stolen securities, in order to convict him of a "conspiracy" to do so, where the evidence, without more, showed that his possession of such securities was acquired by him following the termination of the transportation, solely for the purpose of disposing of them as a "fence." The holding in that case is limited to the peculiar facts surrounding the supplemental instructions, to a "hopelessly deadlocked" jury, to the effect that they could find an accused "guilty of a conspiracy to transport stolen notes if he joined in their disposal after the transportation had ended" (326 U.S. at 613, 614).

(2) that at the time he sold them petitioner knew them to be stolen and (3) that at such time they were in interstate commerce.

As we have shown, the first two elements were abundantly proved. The interstate character of the bonds at the time of sale is the only issue as to these counts.

We think there can be no question as to the interstate character of bonds stolen in New York and New Jersey about a month before their sale. Manifestly the jury was justified in inferring that the ultimate purpose of the theft was sale and that the bonds had not come to rest until they were sold in another state. See *Parsons* v. *United States,* 188 F. 2d 878 (C.A. 5); *McNally* v. *Hill,* 69 F. 2d 38 (C.A. 3).

There is more question as to the interstate character of bonds stolen three or four years before the sale. As to HOLC bonds stolen in California, however, there is proof that before the sale in Pennsylvania, petitioner told Nesbitt that a friend in New York had those bonds to sell. The jury thus had before it evidence to show that such bonds were still in interstate commerce at the time petitioner sold them. If the evidence is sufficient to sustain the conviction on any one count, the general sentence imposed on petitioner would remain undisturbed, since it was imposed on the whole indictment and does not exceed the maximum that could have been given under any one count. *Abrams* v. *United*

States, 250 U.S. 616, 619; *Powers* v. *United States,* 223 U.S. 303, 312; *Claassen* v. *United States,* 142 U.S. 140, 146.

2. Petitioner's contention that his statement to Nesbitt that a friend in New York had HOLC and West Penn bonds to sell is an uncorroborated admission used to establish the corpus delicti (Pet. 28-31) is refuted by the facts discussed in point one. The stolen character of the bonds, the fact that they had been transported from the place of theft to Pennsylvania, and petitioner's knowledge of their stolen character were all established by independent evidence.

The only element of any offense which Nesbitt's testimony can be said to establish is that the HOLC bonds stolen in California in 1944 were still in interstate commerce at the time they were sold by petitioner in September and October 1948. The statement to Nesbitt was made in August prior to the sale. The rule requiring corroboration does not apply to admissions prior to the crime. *Warszower* v. *United States,* 312 U.S. 342, 347.

CONCLUSION

The judgment below is correct. The petition for certiorari presents no questions warranting review by this Court and should be denied.

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